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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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No. 206

LUIGI MASCITTI,

Appellant,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

JACK WASSERMAN,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5148-50

LUIGI MASCITTI,

Plaintiff,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES

JURISDICTIONAL STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT RULES

Statutory Basis for Jurisdiction

Appellant's complaint herein seeks to declare invalid an order of deportation entered against him on the ground that the deportation statute (54 Stat. 673, 41 Stat. 1008, 40 Stat. 1012; 8 U.S.C. 137) as construed and applied to him is unconstitutional. A permanent injunction is sought against appellee. Appellant filed his complaint in the District Court on November 22, 1950, and at the same time filed a motion for a preliminary injunction asserting the unconstitutionality of this federal statute. On February 20, 1951, a three judge court was convened pursuant to 28 U.S.C. 2282, 2284 and on March 19, 1951, the

application for a preliminary hearing was heard by the said three judge court which entered an order on March 20, 1951 denying such preliminary injunction on the ground that the statute was constitutional. In its order, the three judge court dissolved itself, and remanded the cause to a single judge for further proceedings. On June 18, 1951, the three judge court reconvened, reaffirmed its denial of the preliminary injunction herein, and dismissed the plaintiff's complaint. This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b). (*American Communications Association* v. *Douds*, 339 U.S. 382).

Opinion Below

The application for a preliminary injunction herein was denied on March 20, 1951 without opinion. The order of the court below denying such application is annexed hereto, as Appendix A. Thereafter, at the suggestion of counsel for both parties, the three judge court reconvened to consider the motion of defendant to dismiss the complaint. The three judge court reconvened, and on June 18, 1951 reaffirmed its denial of a preliminary injunction and dismissed plaintiff's complaint. Appendix B. No opinion accompanied this second order.

The Statute

Prior to 1940, the Act of October 16, 1918 (8 U.S.C. 137) provided *inter alia* for the exclusion and deportation of aliens who were presently members of organizations advocating or distributing literature advocating the overthrow of the government by force and violence. *Kessler* v. *Strecker*, 307 U. S. 22.

Section 23(b) of the Alien Registration Act of 1940 (54 Stat. 673) amended Section 2 of the Act of October

16, 1918 (40 Stat. 1012, 41 Stat. 1008; 8 U.S.C. 137) to read as follows:

> "Any alien who was at the time of entering the United States, *or has been at any time thereafter,* a member of any one of the classes of aliens enumerated in Section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in this sub-chapter. *The provisions of this section shall be applicable to the classes of aliens mentioned in this act, irrespective of the time of their entry into the United States.*" (Underscoring supplied.)

Statement

The facts alleged in appellant's complaint are undisputed, are deemed admitted on respondent's motion to dismiss and are supported by the immigration file which was made a part of the record in the court below. (*Kroesse* v. *General Castings Corp.*, 179 F. (2d) 760, cert. denied 339 U. S. 983). The complaint alleges that the appellant is a native of Italy and that he entered the United States for permanent residence in 1920 (when he was 16 years old) (Par. 2). In 1946 he was arrested in deportation proceedings and thereafter ordered deported because of membership in subversive organizations prior to 1929 (Par. 5-7). Appellant is married to a legally resident alien, has an American born citizen son and has been of good character and loyal to the United States since 1929. (Par. 7). His deportation is predicated solely upon past membership in a subversive organization which offense was made a ground of deportation in 1940. (Par. 9). Appellant never personally advocated overthrow of the Government, was not aware that the organizations of which he was a member did so, and he never participated in any activities of these subversive organizations which were in further-

ance of governmental overthrow. In 1929, when he became aware of the character of the subversive organizations of which he was a member, he resigned and he has been a loyal resident of the United States for more than 20 years. (Par. 10-15).

The Board of Immigration Appeals, acting for the appellee, in its opinion directing the deportation of appellant, declared:

> "Respondent is a 46-year-old, a native and citizen of Italy whose only entry into the United States was on September 11, 1920, at which time he was admitted for permanent residence.
>
> "Respondent lives with his wife, a legally resident alien, and his United States citizen son. The record established that respondent has been regularly employed, supports his family, and that they are dependent upon him. He is well thought of in his community and by his employers and is a good workman. Aside from the factors which give rise to this proceeding, respondent's record is excellent. He has no criminal record. An independent investigation conducted by the Immigration and Naturalization Service indicates that all persons interviewed had confidence in respondent's good character and loyalty to the United States and believed that he would be a good citizen. . . .
>
> "Respondent has testified that he has no connections with the Communist Party since 1929. There is nothing in the record to show that he has been so connected."

The Board further held that it was immaterial whether appellant was aware of the subversive aims of the organizations of which he was a member, and that mere past membership, whether knowingly or not, was sufficient to form a basis for deportation. (Appendix C.)

Appellant asserts the unconstitutionality of the statute enacted in 1940 which in 1950 seeks to separate him (for

conduct prior to 1929) from his family, home and the land to which he has been loyal for twenty years or more, on the grounds that it is (a) *ex post facto;* (b) violative of the First Amendment; (c) violative of the Fifth Amendment.

Substantial Federal Question Is Presented

The sole issue raised by the complaint herein is the constitutionality of the deportation statute as applied to the appellant. The sole basis for the denial of the preliminary injunction and dismissal of the complaint herein in the court below was the constitutionality of the deportation statute challenged herein. (Appendix A and B). The ruling below effectively disposed of the controversy between the parties.

Appellant submits that substantial constitutional questions are presented herein as to whether the deportation statue is invalid as applied to him on the ground that the statute violates the *ex post facto* provisions of the Constitution, and the First and Fifth Amendments. These constitutional issues, although previously presented to this court, in *Bridges* v. *Wixon,* 326 U. S. 135, have not been decided by the Supreme Court. They are issues which continually recur in deportation cases and should be decided by this court.

Resident Aliens Are Protected by the Constitution

There can be little doubt that aliens residing in the United States are protected by the Constitution. Thus in *Sung* v. *McGrath,* 339 U. S. 33, following the *Japanese Immigrant* case, 189 U. S. 86, it was held that deportation proceedings which violated the due process clause of the Constitution, were null and void. In *Yick Wo* v. *Hopkins,* 118 U. S. 356 it was held that the practice of unlawful discrimination against Chinese aliens in the grant of laundry

licenses violated the Constitution, and in *Wong Wing* v. *U. S.*, 163 U. S. 228, it was decided that an immigration statute which inflicted punishment at hard labor without a judicial trial as a part of the deportation process was unconstitutional. Finally it has been held administratively, following a dictum in *Bilokumsky* v. *Todd*, 263 U. S. 149 that deportation may not constitutionally be predicated upon evidence unlawfully seized in violation of the Fourth Amendment of the Constitution.

Only in the case of an alien knocking at our gates has it been held that a non-citizen may not attack the constitutionality of a statute. *Knauff* v. *Shaughnessy*, 338 U. S. 537. Such is not the case before us.

I

The Statute Violates the Ex Post Facto Prohibition of the Constitution

1. *The 1940 Amendment operates retrospectively.* There can be no doubt, and the government admitted in the court below, that the law herein questioned is retroactive. Prior to 1940 only present membership in proscribed organizations furnished grounds for deportation. The law prior to 1940 was interpreted by Justice Roberts in *Kessler* v. *Strecker*, 307 U. S. 22 where he stated:

> "In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what reason, he was a member of the described organization. In the absence of such expression we conclude that it is the *present membership*, or *present affiliation*—a fact to be determined on evidence—which

bars admission, bars naturalization, and requires deportation." (Italics supplied.)

2. *The ex post facto prohibition forbids retroactive civil legislation.* There is no decision of this Court squarely holding that the *ex post facto* prohibition of the Constitution does not apply to the deportation process. There are Supreme Court *dicta* however which say that the *ex post facto* provisions are inapplicable on the ground that the prohibition applies only to criminal statutes. These *dicta* will be analyzed below. However, attention will first be directed to determine the validity of the basic proposition, commonly assumed without reflection, that the *ex post facto* prohibition relates only to criminal sanctions. It is submitted that such a doctrine is not supported by analysis of the relevant cases of this Court.

Calder v. *Bull*, 3 Dall 386 (1798), was the first *ex post facto* decision of the Supreme Court. It upheld the right of the Connecticut legislature to set aside a court decree disallowing the probate of a will. The resolution of the legislature granted a new trial. In the course of its opinion the Supreme Court stated that the *ex post facto* prohibition was confined to criminal legislation.

Samuel Corwin in his biography entitled *John Marshall and the Constitution* describes Chief Justice Marshall's displeasure with the decision in *Calder* v. *Bull* and states at p. 150:

> "The decision roused sharp criticism and the judges themselves seem fairly to repent of it even in handing it down."

In *Fletcher* v. *Peck*, 6 Cranch 87 (1810) at 138-139, Chief Justice Marshall clearly indicated that he considered both the bill of attainder and *ex post facto* prohibition applicable to civil legislation. He there stated:

> "This rescinding act would have the effect of an *ex post facto* law. . . . This cannot be effected in

> the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant."

And, in a special appendix to *Saterlee* v. *Mathewson*, 2 Peters 414 (1829) at p. 681 (7 Law Ed. 561) Justice Johnson described the language in *Calder* v. *Bull* as *dicta* and devoted four pages to establish that the *ex post facto* prohibition applied to civil proceedings. He stated at page 682:

> "I then have a right to deny that the construction intimated by three judges in the case of Calder v. Bull is entitled to the weight of an adjudication. Nor is it immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.
>
> * * * * * * *
>
> "That the phrase 'ex post facto' is not confined in its ordinary signification to criminal law or criminal statutes admits of positive demonstration."

Justice Johnson then traced the common law history of *ex post facto* and gave instances where at common law it had been used in connection with civil matters. (See: *Wilkinson* v. *Meyer*, 2 Lord Raymond 1350, 1352; Sir Francis Bacon's Maxims #8 and #12).

Writing in 15 *California Law Review*, 269, 270 Prof. Breck McAllister of the University of Washington asserts:

> "Two writers after extensive examination of the records of the Constitutional Convention of 1787 and of the state ratifying conventions, have concluded that the phrase ex post facto was not used in the technical sense of a prohibition against criminal retroactive laws, but was intended to supplement the clause prohibiting the states from impairing the obligation of contracts, as a prohibition against all retroactive legisla-

tion. *The real mischief aimed at, it is pointed out, was retroactive civil legislation.*"

Prof. McAllister also advances the theory that *Calder* v. *Bull* incorrectly analyzed the problem because it was decided in 1798 and the records of the Constitutional Convention were not published until 1819. The two writers referred to by Prof. McAllister were articles by Prof. O. P. Field of the University of Indiana in 20 *Michigan Law Review,* 315 (reprinted in 2 *Select Essays on the Constitutional Law,* 1337) and by B. T. DeWitt in 15 *Political Science Quarterly,* 96.

B. T. DeWitt in 15 *Political Science Quarterly,* 96 at page 97 points out that:

> "It is equally manifest that the original intention of the convention in adopting Article 1, Section 9 that 'no bill of attainder or ex post facto law shall be passed' was to forbid the impairment of the obligations of contracts by national legislation."

And DeWitt further relates at page 103 that "Blackstone uses *ex post facto* more frequently of matters relating to property rights and civil proceedings than of matters relating to crimes and criminal proceedings." (Citing Cooley's Blackstone Volume 1, Book II, Ch. 20, pp. 308, 334; Ch. 22, p. 367; ch. 11, 454).

The real mischief in *ex post facto* legislation is the unfairness of its retroactive provisions. It is just as unfair to punish someone retrospectively and *nunc pro tunc* for past conduct criminally as it is to punish him under our civil laws. It is therefore not surprising that the Supreme Court itself declined to follow *Calder* v. *Bull* after the Civil War when three cases arose.

The first case was *Cummings* v. *Missouri,* 4 Wall 277, which involved a provision of the Missouri Constitution of

1865 to the effect that no person should practice as an attorney or clergyman unless he took a prescribed oath that he had not engaged in hostility against or been disloyal to the United States. Cummings was a Catholic priest who was convicted by the Missouri court of preaching without having taken the prescribed oath. The court specifically held that the requirement of a loyalty oath as to past conduct was *ex post facto* (4 Wall 326, 377) as well as a bill of attainder (4 Wall 323, 377). In so doing it specifically held that these constitutional provisions applied to civil proceedings. (4 Wall 326, 327).

In the second case, *Ex Parte Garland,* 4 Wall 333, there was involved the constitutionality of a Federal statute which required an individual to swear as to his past loyalty in order to practice as an attorney in the Federal courts. Garland, a member of the Confederate Congress, applied to the Supreme Court for permission to continue to practice law without taking the oath. The Court held that this provision was unconstitutional both upon the ground that it was a bill of attainder (4 Wall 377) and *ex post facto* (4 Wall 377, 378).

In both cases, dissenting opinions were recorded (4 Wall 333, 382) on the ground that under *Calder* v. *Bull ex post facto* was confined to criminal proceedings. (4 Wall 390, 391).

In the third case, *Pierce* v. *Carskadon,* 16 Wall 234, 239, a statute required the taking of a loyalty oath to secure a rehearing in civil litigation. The Court relying upon the *Cummings* and *Garland* cases held the law unconstitutional.

There can be little doubt that these three court decisions which followed *Calder* v. *Bull* were square rulings inconsistent with the ruling in that early case. The *Cummings* and *Garland* cases, if recognized today, overrule the decision in *Calder* v. *Bull.* And, in *Lovett* v. *United States,* 328

U. S. 303 and *Garner* v. *Los Angeles,* 19 Law Week 4351, 341 U. S. —, the most recent Supreme Court decisions on Article 1, Section 9(3) of the Constitution, this Court specifically acknowledged that the *Cummings* and *Garland* cases represented a correct statement of the law today. The *Lovett* case, it is true, dealt exclusively with bills of attainder, but significantly, the court held that the constitutional prohibition Article 1, Section 9(3) related to civil matters. A bill of attainder is a legislative act which inflicts punishment and it necessarily operates on past facts. For that reason the early cases like the *Cummings* and *Garland* cases made no distinction between *ex post facto* and *bills of attainder.* The reaffirmation of the *Cummings* and *Garland* cases in the *Lovett* and *Garner* cases, clearly indicates that the Supreme Court regards that both prohibitions relate to civil matters.

In 52 *Yale Law Journal* at page 116, 117, the Supreme Court authorities relied upon by appellee in the court below are analyzed. It will be observed that these authorities take the view that the *ex post facto* prohibition is confined to criminal matters. It will further be observed that these authorities were *dicta* and unnecessary to the case holdings.

In *Johannessen* v. *United States,* 225 U. S. 227, denaturalization because of fraud and not deportation was involved. Taking something away from a man to which he was never entitled does not involve *ex post facto* legislation. In *Bugajewitz* v. *Adams,* 228 U. S. 585, deportation of an alien presently practicing prostitution was involved. No *ex post facto* question was presented. In *Mahler* v. *Eby,* 264 U. S. 32, the case was remanded because the Secretary of Labor failed to make a present finding that the alien was undesirable. Deportation of an alien held to be undesirable today involves no *ex post facto* feature. In addition it will be observed that counsel for the alien in the *Mahler* case

made no claim in his brief before the Supreme Court that the legislation was *ex post facto.*

The *dicta* in the foregoing cases cannot be regarded as controlling. In reviewing these authorities 52 *Yale Law Journal* 116 concludes:

> "Although some cases have said that a criminal penalty must be involved, the weight of authority, relying on *Ex Parte Garland* and *Cummings* v. *Missouri*, have asserted the more reasonable view that mere punishment of whatever nature is the criterion."

3. *Deportation involves punishment within the ex post facto prohibition.* In *Cummings.* v. *Missouri* and *Ex Parte Garland supra*, the Supreme Court held the deprivation of the right to practice one's profession involved punishment. In the *Cummings* case, the court said that: (4 Wall 320-322, 324, 325)

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
>
> . . . . . .
>
> "'Some punishments', says Blackstone, 'consist of exile or banishment, by abjuration of the realm or transportation, others in loss of liberty . . .'
>
> . . . . . .
>
> "The theory upon which our political institutions rest is that all men have certain inalienable rights—that among them are life, liberty and the pursuit of happiness . . . Any deprivation or suspension of any of these rights for past misconduct is punishment, and can be in no other wise defined.
>
> . . . . . .
>
> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It

intended that the right of the citizen should be secure against deprivation for past misconduct by legislative enactment, under any form however disguised."

In *Bridges* v. *Wixon*, 326 U. S. 135 Justice Douglas speaking for the majority stated:

> "It must be remembered that although deportation technically is not criminal punishment (*Johannessen* v. *United States*, 225 U. S. 227, 242; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Mahler* v. *Eby*, 264 U. S. 32, 39) it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. *Cummings* v. *Missouri*, 4 Wall 277; *Ex parte Garland*, 4 Wall 333. As stated by Justice Brandeis speaking for the Court in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deportation may result in the loss 'of all that makes life worth living' ".
>
> . . . . . .
>
> "Here the liberty of an individual is at stake . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. *That deportation is a penalty—at times a most serious one—cannot be doubted.*"

More recently in *Delgadillo* v. *Carmichael*, 332 U. S. 388, Justice Douglas stated that:

> "Deportation can be the equivalent of banishment or exile . . . The stakes are indeed high and momentous for the alien who has acquired residence here."

See also: *Fong Haw Tan* v. *Phelan*, 333 U. S. 10.

In *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 Justice Brandeis said that deportation

> "may result also in loss of both property and life; or in all that makes life worth living."

Wallis v. *Tecchio*, 65 F. (2d) 250, 252 (C.C.A. 5, 1933) states that:

> "The statute in its effect upon the individual must be classified as penal . . . We regard forfeiture for misconduct of the privilege of an existing residence in the United States as a penalty."

In *United States ex rel Klovis* v. *Davis*, 13 F. (2d) 630 (C.C.A. 2, 1926) it was again said:

> "However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone."

In the last term of the Supreme Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, Justice Jackson declared that:

> "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

And in the October, 1950 term of the Supreme Court, Chief Justice Vinson, speaking for the Court, stated in *Jordan* v. *DeGeorge*, 95 Law Ed. at 653, 341 U. S. 323,

> "The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile . . . : It is the forfeiture for misconduct of a residence in this country. Such forfeiture is a penalty. Fong Haw Tan v. Phelan 333 U. S. 6, 92 L. Ed. 433, 68 S. Ct. 374, supra."

Can there be any doubt that under the foregoing authorities the deportation of appellant who came here as a youth at the age of 16, would be a penalty and punishment? Would not plaintiff prefer being sent to jail for a year under *ex*

post facto criminal legislation, rather than being punished *ex post facto* by perpetual exile from his family, his home, his job and the land where he has resided for over thirty years and to which he has been loyal for over twenty years? Of what value is it to surround appellant with constitutional guarantees of due process, if he may be summarily and arbitrarily deported under retrospective legislation?

4. *Deportation for innocent organization membership offends ex post facto prohibition.* In *Garner* v. *Los Angeles*, *supra*, the majority as well as the minority of the court considered that an ordinance would be *ex post facto* if it required loss of municipal employment because of "past conduct lawful at the time it was engaged in." The majority found the ordinance constitutional on the assumption that it did not adversely affect "those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent . . ."

The complaint herein specifically alleges that plaintiff was not aware of the aims of the subversive organizations of which he was a member, that he never advocated overthrow of the government and that when he became aware of the character of these organizations, he resigned (Par. 10-15). The Board of Immigration Appeals in directing appellant's deportation, held in conformity with existing Department of Justice interpretation—an interpretation severely criticized by members of Congress—that unwitting membership was sufficient for deportation. (Appendix C; Congressional Record January 2, 1951, pp. 17285, 17287).

The views of those senators and representatives who managed the Internal Security Act of 1950 which reenacted and expanded the statute here under attack are expressed in Congressional Record January 2, 1951, p 17285 *et seq.* These senators and representatives approved the views of

Judge Anderson as expressed in *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (Reversed, 277 Fed. 129) who stated in a deportation case that:

> "... such membership must be a real membership in or an actual affiliation with the proscribed organization. .... Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purpose they have no real knowledge."

Nevertheless, the statute herein, as construed and applied by defendant, requires deportation for innocent past membership in a proscribed organization. Such interpretation is in conflict with the ruling of this court in *Garner* v. *Los Angeles, supra*, and in violation of the *ex post facto* prohibition of the Constitution. Appellant submits that he was never subject to deportation because his membership prior to his resignation in 1929 was innocent. [Assuming that plaintiff was subject to deportation prior to 1929 for innocent membership or because it may be found that his membership was with *scienter*, then in 1930 he was no longer deportable. *Kessler* v. *Strecker, supra*. And like property rights protected by the statute of limitations, plaintiff's residence could only be declared forfeit in accordance with the requirements of due process. See *Stewart* v. *Keyes*, 295 U. S. 403, 417.]

5. *A substantial ex post facto question is presented.* Here, there are two conflicting lines of authority. There is *Calder* v. *Bull*, decided in 1798 and subsequent dicta relying upon *Calder* v. *Bull*. On the other hand, the more recent Supreme Court decisions, the *Cummings*, *Garland*, *Pierce* and *Lovett* and *Garner* cases take a contrary view. In addition, respectable writers on constitutional law also

follow the view asserted by plaintiff. In view of these authorities and the fact that it clearly appears that deportation is punishment, we respectfully submit that the *ex post facto* question presented merits review by the Supreme Court.

II

The Statute Violates Due Process

The basic problem presented herein requires an adjustment of the conflict between the so-called plenary power of Congress to deport and the guarantees of due process accorded to resident aliens. Is an alien protected under the Constitution against an arbitrary deportation statute of Congress? Can Congress deport all blue-eyed aliens as suggested recently by Judge Swan in *U. S. ex rel Harisiades* v. *Shaughnessy*, 187 F. (2d) 137 (Certiorari application pending)? Is a resident alien merely entitled to procedural due process without any right to attack an arbitrary deportation statute as a matter of substantive due process? Is a resident alien guaranteed procedural and substantive due process with relation to all statutes except a deportation statute?

The power of Congress to provide, on any grounds it sees fit, for the expulsion even of aliens with an established domicile here, was asserted in sweeping terms in 1895. *Fong Yue Ting* v. *United States*, 149 U. S. 498. This was a Chinese expulsion case. But even at the moment of decision, three members of the Court—Chief Justice Fuller, Justices Brewer and Field—dissented profoundly. Said the Chief Justice (p. 763):

> ". . . it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in

conflict with the written Constitution by which that government was created and those principles secured."

Eight years later, in the *Japanese Immigrant* case, 189 U. S. 86, 100, this Court rejected the full sweep of *Fong Yue Ting*. Mr. Justice Harlan for the Court, overruling Government contentions strikingly similar to those advanced here, said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

That the fundamental principles of procedural due process have full rein in deportation has since become settled doctrine, notwithstanding the plenary power of Congress to exclude or deport aliens. *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335. Rejection of the Government's argument of "plenary power" in the *Japanese Immigrant* case, some fifty odd years ago, has left the Republic unshaken.

But the Fifth Amendment embodies substantive, as well as procedural guarantees,—and these, "to any person."

Appellant asserts that he never personally believed in the principles of the Communist Party nor in the overthrow of the government. He is being deported solely and purely because of past association, over twenty years ago, with a proscribed organization, regardless of his knowledge of its aims or purposes. In condemning this as violative of the Constitution, Justice Murphy in *Bridges* v. *Wixon*, 326 U. S. 135 stated:

> "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom

and due process of law. *Schneiderman* v. *United States*, 320 U. S. 118, 154. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, Free Speech in the United States (1941), pp. 472-475.

"Yet the deportation statute on its face and in its present application flatly disregards this rule. It condemns an alien to exile for beliefs and teachings to which he may not personally subscribe and of which he may not even be aware. This fact alone is enough to invalidate the legislation. Cf. DeJong v. Oregon, 299 U. S. 353; Herndon v. Lowry, 301 U. S. 242; Whitney v. California, 274 U. S. 357."

See also: *DeJonge* v. *Oregon*, 299 U. S. 353; 52 *Yale Law Journal* 108, 114.

Compare, the President's Loyalty Program and its designation of subversive organizations. The rules of the Civil Service Commission prescribe:

"In connection with the designation of these organizations, the Attorney General has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or sympathetic association with, any organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide." 5 *Code of Federal Regulations* 210.15 p. 200 (1949 ed.)

Yet for the alien, who faces loss of liberty and all that makes life worth living, instead of loss of a government job, past associations of more than twenty years ago, which

have no reasonable relation to our present internal security or to his moral worth or desirability today are not simply "one piece of evidence" but a conclusive presumption of guilt by association. Such arbitrary application of the statute to appellant, offends due process.

III

The Statute Violates the First Amendment

If the statute, as applied to appellant, had a reasonable relationship to the power of Congress to expel undesirable aliens, the protection of the First Amendment would afford no relief to him. But deportation of an alien for innocent and unwitting associations, twenty-two years removed, presents no present dangers requiring curtailment of rights protected by the First Amendment.

The power of Congress to deport stands in no different setting, in relation to the First Amendment, than the police power—a problem which has faced this court frequently. "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing." Justice Frankfurter, *Niemotko* v. *Maryland*, 95 L. Ed. 263, 264, 340 U. S. 268. "Freedom of speech and of press is accorded aliens residing in this country. *Bridges* v. *California*, 314 U. S. 252 . . ." Justice Douglas, *Bridges* v. *Wixon*, 326 U. S. 135, 148.

Appellant asserts that in innocently convening twenty years ago with members of organizations now deemed subversive, he merely exercised his rights of free speech and assemblage. Since his association as alleged in the complaint was for lawful purposes and presented no clear and present danger (*Schenck* v. *United States*, 249 U. S. 47) and did not constitute a conspiracy participated in by appellant to overthrow the government as speedily as circumstances would permit (*Dennis* v. *United States*, 19

Law Week 4388, 341 U. S. —), these rights were protected by the First Amendment. In the *Bridges* case, Justice Murphy stated:

> "As shown by the record in this case, Harry Bridges has done no more than exercise his personal right to free speech and association. Yet upon proof of that fact, he would be subject to deportation under the statute. The invalidity of legislation of such nature is inescapable."

See also: 52 *Yale Law Journal* 108, 115.

It is submitted that on the facts presented and where as here, one justice of the Supreme Court has in recent years declared a statute unconstitutional and where the full court has not yet passed upon the constitutionality of the statute, a substanial constitutional question is present meriting review by this court.

Conclusion

This is not a case where counsel have merely asserted constitutional issues. Here research discloses that a very substantial *ex post facto* question is presented. Other constitutional issues are presented with which a former member of the Supreme Court agrees. They have not been previously settled by this Court and they merit review by the Supreme Court. It is therefore respectfully submitted that jurisdiction be assumed and the cause be reviewed upon appeal.

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Of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5148-50

Filed Mar. 20, 1951. Harry M. Hull, Clerk

LUIGI MASCITTI, *Plaintiff*,

v.

J. HOWARD MCGRATH, Attorney General of the United States, *Defendant*

ORDER

This case came on to be heard before a three-judge statutory court on the motion of the plaintiff for a preliminary injunction, and a motion of the defendant for summary judgment or to dismiss the complaint; and the court having determined that the Act of October 16, 1918, as amended by the Act of June 28, 1940, is constitutional, it is

Ordered, That the motion for a preliminary injunction is hereby denied; that the three-judge court be dissolved; and that the case be remanded to the United States District Judge Curran for the determination of the other questions.

(S.) JAMES M. PROCTOR,
United States Circuit Judge;
(S.) ALEXANDER HOLTZOFF,
United States District Judge;
(S.) EDWARD M. CURRAN,
United States District Judge.

March 20, 1951.

APPENDIX "B"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5148-50

Filed June 18, 1951

LUIGI MASCITTI, *Plaintiff*,

v.

J. HOWARD MCGRATH, Attorney General of the United States, *Defendant*

AMENDED ORDER

This case came on to be heard before a three-judge statutory court on the motion of the plaintiff for a preliminary injunction, and a motion of the defendant for summary judgment, or to dismiss the complaint; and the court having determined that the Act of October 16, 1918, as amended by the Act of June 28, 1940, is constitutional; and the court having denied the motion for preliminary injunction, and having dissolved the three-judge court, and having remanded the case to United States District Judge Curran for the determinaiton of the other questions, it is now Ordered,

That the original order be vacated and set aside, and the three-judge court be reconvened; and it is Further Ordered,

That the motion for a preliminary injunction is hereby denied; that the motion of the defendant to dismiss the complaint is granted; and judgment is entered for the defendant; and the three-judge court is now dissolved.

JAMES M. PROCTOR,
United States Circuit Judge;
ALEXANDER HOLTZOFF,
United States District Judge;
EDWARD M. CURRAN,
United States District Judge.

June 18, 1951.

APPENDIX "C"

File: A-5237203

In re: LUIGI MASCITTI or LUIGI LOMBARDI MASCITTI or LOUIS MASCITTI in Deportation Proceedings

In Behalf of Respondent: Filindo B. Masino, Esquire, 1420 Walnut Street, Philadelphia, Pennsylvania and Colonel B. G. Habberton on behalf of the Service (Alien also present) Heard August 17, 1950.

Charges:

Warrant: Act of 1918—After entry was a member of the following class set forth in Section 1 of said Act: An Alien who is a member of an organization, association, society, or group that advises, advocates, or teaches the overthrow, by force or violence of the Government of the United States.

Lodged: Act of 1918—After entry was a member of the following class set forth in Section 1 of said Act: An Alien who is a member of an organization, association, society and group that believes in, advises, advocates and teaches the United States;

Act of 1918—After entry was a member of the following class set forth in Section 1 of said Act: An Alien who is a member of an organization, association, society and group that writes, circulates, distributes, prints, publishes, and displays that causes to be written, circulated, distributed, printed, published and displayed, and that has in its possession for the purpose of circulation, distribution, publication, issue and display, written and printed matter advising, advocating and teaching the overthrow by force and violence of the Government of the United States.

Application: That warrant of arrest be canceled; or suspension of deportation, or in the alternative, voluntary departure and preexamination; or, exercise of the 7th Proviso to Section 3 of the Act of February 5, 1917.

Detention Status: Released on $1,000 bond.

Respondent is 46 years old, a native and citizen of Italy, whose only entry into the United States was on September 11, 1920, at which time he was admitted for permanent residence.

Respondent lives with his wife, a legally resident alien, and his United States citizen son. The record established that respondent has been regularly employed, supports his family, and that they are dependent upon him. He is well thought of in his community and by his employers, and is a good workman. Aside from the factors that gave rise to this proceeding, respondent's record is excellent. He has no criminal record, an independent investigation conducted by the Immigration and Naturalization Service indicates that all persons interviewed had confidence in respondent's good character and loyalty to the United States and believed that he would be a good citizen.

The Examining Inspector and counsel entered into a stipulation in which it was agreed that respondent had been a member of the Young Workers Party, the Workers Party, and the Workers (Communist) Party between 1923 and 1929. It was further stipulated that those organizations possessed, circulated, and distributed certain documents which form a part of this record and are designated Exhibits 6 to 17, and that during the period of his membership these organizations advised, advocated, and taught the doctrines and principles contained in those exhibits. The titles of the exhibits are set forth in the Assistant Commissioner's opinion, page 3, footnote 2. They include the most commonly distributed writings of Marx, Engels, Lenin and Stalin.

Respondent has testified that he has no connection with the Communist Party since 1929. There is nothing in the record to show that he has been so connected. He became a member of the International Workers Order in 1938 and continued in that organization until 1945. He was financial secretary of his lodge, the local unit, for about a year and a half immediately prior to the termination of his membership in 1945. He testified that he joined the I. W. O. because it offered inexpensive insurance benefits, beginning with very small payments. He testified further that the payments increased until he found them onerous. Further, he testified that as secretary he attended meetings much more regularly than he had in the past, and he discovered that some members were "talking about Russia" in the same

way as in the Communist Party had and he found that some members were distributing an Italian-language newspaper which seemed to him to be of Communist tenor.

In a number of cases we have found that the Communist Party of the United States advocated the overthrow of the Government of the United States by force and violence and it distributed printed matter which so advocated. We find that the evidence of record likewise supports that conclusion. *Matter of Harisiades*, A-5300736, May 13, 1949; *Matter of Fritz*, A-3430058, July 1, 1949; Matter of Martinez, A-3407165, August 12, 1949; *Matter of Obermaier*, A-4690122, September 13, 1949; *Matter of Lipshitz*, A-4925135, November 16, 1949.[1] This line of cases is supported by the recent decision in *Harisiades* v. *Shaughnessy*, 90 F. Supp. 397 (S D. N. Y. February 9, 1950).

Counsel for the alien concedes that the Communist Party advocated the over-throw of the Government of the United States by force and violence during the period of the respondent's membership and distributed printed matter which so advocated during that period. It is his contention, however, that the respondent joined the organization under the mistaken belief as to its true nature, and that he resigned when he discovered the aims and precepts of the party.

In the first place, the statute by its language does not apply only to "knowing membership." It is therefore, unnecessary to prove the knowledge. *Creco* v. *Haff*, 63 F. (2d) 862; *In re Saderquist*, 11 F. Supp. 526, affirmed *Sorquist* v. *Ward*, 83 F. (2d) 890. Secondly, it has been held that membership is sufficient evidence of knowledge of the proscribed doctrines. *Skaffington* v. *Katzeff*, 277 Fed. 129, 138; *Ex parte Vilarino*, 50 F. (2d) 582, 586. Lastly, the evidence in

[1] Under the recently enacted Internal Security Act of 1950 (P. L. 831) it ceased to be necessary to establish that the Communist Party is one advocating the overthrow of the government by force and violence. In that Act, for the first time, Section 1(2) (C), membership in or affiliated with the Communist Party, specifically and by name, is made grounds for exclusion or deportation. In the present case, however, the warrant does not contain charges under the new Act, nor have charges under the Act been lodged against respondent. Therefore, it is still necessary for us to find that the Communist Party is a party advocating overthrow of the government etc.

this case shows that the respondent attended meetings of the Communist Party, read its literature, listened to speeches, and paid his dues.

Respondent has requested the exercise of the discretion granted to the Attorney General under the 7th Proviso to Section 3 of the Immigration Act of 1917, as amended, in order that he may depart voluntarily from the United States and reenter, despite the grounds for deportation and exclusion. The representative of the Immigration and Naturalization Service argued that because this respondent entered the United States legally it is not possible to exercise the 7th Proviso as to him; that only an illegally resident alien or one presently outside the United States is eligible for 7th proviso relief. For a number of years we have been permitting an alien to adjust his immigration status, whether he is resident, illegally or legally. He may have become deportable after his arrival in the United States by conviction of the commission of a crime within five years after entry or by the conviction of the commission more than once of crimes involving moral turpitude, by having become a member of a proscribed organization, and in any one of a number of other ways having become deportable after his legal entry. When the alien has had an otherwise good record, long residence in the United States, and (usually) family ties, and when the record convinces us that there is an unquestionable rehabilitation and that deportation would result in unnecessary hardship, we have exercised the 7th proviso in advance of his departure.

Until recently it was not our policy to grant 7th Proviso relief to persons who had been deported because of membership in proscribed organizations. However, in several cases during the past year, with the approval of the Attorney General, we have granted 7th Proviso relief to persons who at some time many years ago had been for a brief period members of the Communist Party. The first of these cases were *Matter of Hausen*, A-7596142 (approved by A. G. November 8, 1949, and *Matter of Dickhoff*, A-5156681 (approved by A. G. December 2, 1949, and *Matter of Piscovic*, A-5366110 (April 14, 1950). In each of these cases the above described elements, or most of them, were present—

that is, good record, long residence, etc. Now however, since the passage of the Internal Security Act of 1950 (P. L. 831) it is not necessary to discuss the extensive record as to the favorable elements in the present case, or the question as to whether or not respondent had knowledge of the aims of the I.W.O. during the time that he was a member of the organization. The Internal Security Act of 1950 takes from the Attorney General the authority to grant relief to any alien in the position in which respondent now finds himself. In part it provides as follows:

> Section 4(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1(1) or section 1(3) of this act or (except in the case of an alien who is legally in the United States temporarily as a nonimmigrant under section 3(1) or 3(7) of the Immigration Act of 1924, as amended) a member of any one of the classes of aliens enumerated in section 1(2) of this act, shall, upon the warrant of the Attorney General, be taken into the custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in the Act, irrespective of the time of their entry into the United States.
>
> Section 6(a) The provisions of the seventh proviso to section 3 of the Immigration Act of February 5, 1917 as amended (39 Stat. 875: 8 U.S.C. 136), relating to the admission of aliens to the United States, shall have no application to cases falling within the purview of section 1 of this Act.

The exceptions relate only to officials and representatives of foreign governments, their staffs, families and servants. The "classes of aliens enumerated" in Section 1(1), 1(2), and 1(3) are very broad.[2] Undeniably they include respond-

[2] For example, the law provides, in part, for the exclusion or deportation of the following: Aliens who, at any time, shall be or shall have been members of any of the following classes:

Section 1(2) (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party

ent. There can be no doubt that Congress intended to withdraw and has withdrawn from the Attorney General the power to grant 7th proviso relief in any case of this kind, no matter how selected or deserving.

In his argument before this Board counsel for respondent addressed himself to the questions (1) of the requirements of "affiliation and/or membership" in proscribed organizations; (2) whether or not the I.W.O. was such an organization when respondent was a member (the Attorney General did not declare it to be a "subversive organization until two years after respondent resigned), and (3) of the consti-

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of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear or may hereafter adopt;

(D) Aliens not within any of the other provisions of this paragraph (2) who advocate the economic, international and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism, or who are members of or affiliated with any organization that advocates the economic, international and governmental doctrines of world communism, or the economic and governmental doctrines of any other form of totalitarianism, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of such organization;

(G). Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published or displayed, or who knowingly have in their possession for the purpose of circulation, publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; or (iii) the unlawful damage injury, or destruction of property; or (iv) sabotage; or (v) the economic, international and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism.

tutionality of the June 28, 1940, amendment to the Act of 1918 (54 Stat. 673; 8 U.S.C. 137), if it is given a "retrospective" interpretation. It is not necessary to discuss these theories and possibilities since the passage of the new Internal Security Act of 1950. Respondent has admitted past membership in the Communist Party and under that law we have no authority to grant discretionary relief were we so inclined.

ORDER: It is ordered that respondent's request for 7th Proviso relief be denied.

IT IS FURTHER ORDERED that the appeal be and the same is hereby dismissed.

CHAIRMAN.

MBMcC;ajw.

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